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Supreme Court, U.S.
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No. 00-860

IN THE

Supreme Court of the United States

CORRECTIONAL SERVICES CORPORATION,
Petitioner,

v.

JOHN E. MALESKO,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Second Circuit

BRIEF OF RESPONDENT

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QUESTION PRESENTED

May a private corporation, operating a correctional facility under color of federal law, be held liable under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1997), for its violation of an inmate's constitutional rights?

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

A. Factual Background 1

B. Proceedings Below 2

SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. *Bivens* Encompasses Mr. Malesko's Claim Against CSC. 8

A. As a Private Entity, CSC Is Not Entitled to Immunity When It Violates The Constitution Under Color of Federal Law. 12

B. Insulating CSC from Suit Because of Its Corporate Status Would Run Counter to *Bivens*' Purposes. 19

C. CSC Is Not Entitled to Immunity by Analogy. 22

1. No Parallel Can Be Drawn Between CSC and a Federal Agency. 22

2. Like a Federal Employee, CSC Is an Appropriate *Bivens* Defendant. 27

3. Because Corporations Are Liable for Their Constitutional Torts Under Section 1983, They Should Also Be Liable Under *Bivens*. 34

D. State Law Does Not Assure Enforcement of the Federal Constitution. 36

E. *Bivens*' Two Exceptions Are Narrow, and Neither Applies Here. 40

CONCLUSION 44

TABLE OF AUTHORITIES

CASES

Page(s)

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 35

Alteiri v. Colasso, 362 A.2d 798 (Conn. 1975) 39

Baran v. Silverman, 83 A. 263 (R.I. 1912) 39

Barr v. Matteo, 360 U.S. 564 (1959) 16

Bell v. Hood, 327 U.S. 678 (1946) 7, 10

Bemis Brothers Bag Co. v. United States, 289 U.S. 28 (1933) 10

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) ..... *passim*

Brown v. Nationsbank, 188 F.3d 579 (5th Cir. 1999) 37

Brown v. United States, 653 F.2d 196 (5th Cir. Unit A 1981) 37

Burton-Bey v. United States, (No. 96-3241) 1996 U.S. App. LEXIS 29372 (10th Cir. Nov. 12, 1996) ... 37

Burton v. Livingston, 791 F.2d 97 (8th Cir. 1986) 37

Bush v. Lucas, 462 U.S. 367 (1983) 9, 38, 40, 41

Butz v. Economou, 438 U.S. 478 (1978) 12, 14, 29, 34, 35

Carey v. Piphus, 435 U.S. 247 (1978) 20, 37

Carlson v. Green, 446 U.S. 14 (1980) ..... *passim*

Chappell v. Wallace, 462 U.S. 296 (1983) 40, 41

City of Los Angeles v. Lyons, 461 U.S. 95 (1983) 42

Cleavinger v. Saxner, 474 U.S. 193 (1985) 14

Clinton v. Jones, 520 U.S. 681 (1997) 14

Cort v. Ash, 422 U.S. 66 (1975) 9

Dade Coal Co. v. Haslett, 83 Ga. 549 (1889) 13

Dalheim v. Lemon, 45 F. 225 (1891) 14

Davis v. Passman, 442 U.S. 228 (1979) 9, 10, 11

DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989) 21

Del Raine v. Williford, 32 F.3d 1024 (7th Cir. 1994) 38

Dobyns v. E-Systems, Inc., 667 F.2d 1219 (5th Cir. 1982) 3, 43

Doe v. McMillan, 412 U.S. 306 (1973) 15

Edwards v. Pocahontas, 47 F. 268 (CC Va. 1891) 14

FDIC v. Meyer, 510 U.S. 471 (1994) ..... *passim*

Feres v. United States, 340 U.S. 135 (1950) 40, 41

Gerena v. Puerto Rico Legal Service, Inc.,
697 F.2d 447 (1st Cir. 1983) 3, 43

Ginn v. Mathews, 533 F.2d 477 (9th Cir.1976) 43

Graham v. Connor, 490 U.S. 386 (1989) 35

Green v. Carlson, 581 F.2d 669 (7th Cir. 1978) 27, 28

Hammons v. Norfolk Southern Corp.,
156 F.3d 701 (6th Cir. 1998) 3, 42

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 14

Hayes v. Cambra, (No. 99-15023) 1999 U.S. App.
LEXIS 30103 (9th Cir. Nov. 15, 1999) 39

Honeycutt v. Louis Pizitz Dry Goods Co.,
180 So. 91 (Ala. 1938) 39

J.I. Case Co. v. Borak, 377 U.S. 426 (1964) 9

Kauffman v. Anglo-American School of Sofia,
28 F.3d 1223 (D.C. Cir. 1994) 3

Kikimura v. Turner, 28 F.3d 592 (7th Cir. 1994) 38

Larson v. Domestic & Foreign Commerce Corp.,
337 U.S. 682 (1949) 16

*Leatherman v. Tarrant County Narcotics Intelligence &
Coordination Unit*, 507 U.S. 163 (1993) 29

Lebron v. National R.R. Passenger Corp.,
513 U.S. 374 (1995) 25

Logue v. United States, 412 U.S. 521 (1973) 25

Lugar v. Edmonson Oil Co.,
457 U.S. 922 (1982) 13, 34, 35

Malley v. Briggs, 475 U.S. 335 (1986) 13

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) ... 7, 9

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) . 39

*McKesson Corp. v. Division of Alcoholic Beverages &
Tobacco*, 496 U.S. 18 (1990) 20

Monell v. Department of Social Services,
436 U.S. 658 (1978) 32, 35

Owen v. Independence, 445 U.S. 622 (1980) 13, 32, 33

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) 39

Pennhurst State Sch. & Hospital v. Halderman,
465 U.S. 89 (1984) 39

Richardson v. McKnight, 521 U.S. 399 (1997) ..... *passim*

Riviello v. Waldron, 47 N.Y.2d 297 (1979) 31

Santa Clara County v. Southern Pacific R.R. Co.,
118 U.S. 394 (1886) 35

Schowengerdt v. General Dynamics Corp.,
823 F.2d 1328 (9th Cir. 1987) 3, 43

Schweiker v. Chilicky, 487 U.S. 412 (1988) 41

Sellers v. United States, 902 F.2d 598 (7th Cir. 1990) ... 32

United States v. Bynum, 408 U.S. 125 (1972) 22

United States v. Johnson, 481 U.S. 681 (1987) 41

United States v. Stanley, 483 U.S. 669 (1987) 40, 41

Walker v. Sauvinet, 92 U.S. (2 Otto.) 90 (1875) 38

Webb v. Jackson, 583 So. 2d 946 (Miss. 1991) 39

West v. Atkins, 487 U.S. 42 (1988) 13

Westfall v. Erwin, 484 U.S. 292 (1988) 14, 15, 16

Wilson v. Layne, 526 U.S. 603 (1999) 11, 35, 38

Wood v. Strickland, 420 U.S. 308 (1975) 42

Wyatt v. Cole, 504 U.S. 158 (1992) 13

Yiamouyiannis v. Chemical Abstracts Service,
521 F.2d 1392 (6th Cir. 1975) 3, 43

STATUTES

5 U.S.C. § 552 ..... 23, 25

12 U.S.C. § 2 25

12 U.S.C. §§ 1811(a) 25

12 U.S.C. § 1812(a)(1) 25

12 U.S.C. § 1462a(c)(1) 25

28 U.S.C. §§ 2679(b) 36

28 U.S.C. § 2680(h) 36

42 U.S.C. § 1983 ..... *passim*

REGULATIONS

28 C.F.R. § 50.15 ..... 18, 26

28 C.F.R. § 542.10 *et seq.* 41

MISCELLANEOUS

American Law Institute, *Principles of Corporate Governance* (1994) 22

Brief for the U.S. as Amicus Curiae Supporting Respondent, *Richardson v. McKnight*, 521 U.S. 399 (1997) .. 42

Bureau of Prisons, Statement of Work: Community Corrections Center (Dec. 2000) .. 16, 21, 26, 30, 31

Bureau of Prisons Program Statement 5566.05,
Use of Force and Application of Restraints on Inmates 21

Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 Geo. L.J. 65 (1999) 33

CSC Annual Report, SEC Form 10K (filed Apr. 2, 2001) 16, 22, 25, 29

CSC Prospectus (Sept. 12, 1996) 16

Department of Justice Web Page http://www.usdoj.gov/02organizations/index.html 23

Letter from George P. Stasiuk to Steven Pasternak (Jan. 11, 1999) 16

Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 Yale L.J. 857 (1984) 33

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STATEMENT OF THE CASE

A. Factual Background

John E. Malesko is a former federal prisoner who served the last four months of his sentence at Le Marquis Community Corrections Center, a halfway house operated by Correctional Services Corporation ("CSC"), and, after suffering the injuries that gave rise to this action, in the hospital. In December 1992, at the age of 58, Mr. Malesko was convicted of securities fraud and sentenced to eighteen months' imprisonment under the supervision of the Federal Bureau of Prisons ("BOP"). Pet. App. 2a. While in prison, Mr. Malesko was diagnosed with congestive heart failure. This condition required Mr. Malesko to take prescription medication and to refrain from physical exertion such as climbing stairs. Jt. App. 10-11.

In February 1994, BOP transferred Mr. Malesko to Le Marquis. CSC, a publicly traded corporation, operated Le Marquis for profit.[1] Despite his medical condition, CSC assigned Mr. Malesko to a fifth-floor room. On March 1, 1994, CSC instituted a policy requiring Le Marquis inmates to take the stairs to their rooms if they lived below the sixth floor, but because of his illness, Mr. Malesko was allowed to continue using the elevator. Jt. App. 11.

On March 18, Mr. Malesko informed CSC that he had run out of his heart medication. CSC did not refill the prescription. *Id.* at 12. Ten days later, a CSC guard compelled Mr. Malesko to take the stairs to his room quickly even though Mr. Malesko reminded him that, because of his heart condition,

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[1] CSC no longer operates Le Marquis. CSC Annual Report, SEC Form 10K at 10 (filed Apr. 2, 2001) (available at www.freeedgar.com, ticker symbol CSCQ).

he was allowed to use the elevator. *Id.* As Mr. Malesko was hurrying up the stairs so that he could be in his room in time for a head count, he suffered a heart attack and fell. Pet. App. 20a; Jt. App. 12. The fall injured his ear and caused ongoing difficulty with balance. Mr. Malesko's injuries have left him unable to work and in need of continuing medical care. Jt. App. 12-13.

B. Proceedings Below

Mr. Malesko filed this action *pro se* on March 27, 1997, in the United States District Court for the Southern District of New York, against petitioner CSC and ten "John Doe" defendants. The complaint has been treated throughout this case as alleging claims only under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). On February 2, 1999, Mr. Malesko, who had since retained counsel, filed an amended complaint naming Jorge Urena, the guard who denied him use of the elevator, as one of the John Doe defendants. CSC filed a motion to dismiss, which the district court granted on July 28, 1999. In that decision, the district court held that, because Mr. Malesko's identification of Mr. Urena in the amended complaint did not relate back to the filing of the orginal complaint, it was time-barred. Pet. App. 22a-24a. The Second Circuit affirmed this holding, Pet. App. 18a, and Mr. Malesko does not challenge it now. With no explanation of its reasoning, the district court also held that under *FDIC v. Meyer*, 510 U.S. 471 (1994), a *Bivens* action can be maintained only against an individual, Pet. App. 20a, even though *Meyer* held only that no *Bivens* action lies against federal government agencies.

The Second Circuit reversed as to CSC, holding that a *Bivens* action may lie against a private corporation acting under color of federal law. The court first noted that, before *Meyer*,

it was settled law among the federal circuits that *Bivens* claims could be asserted against private corporations. Although several circuits had not addressed the question, all those that had, had held that the cause of action was available. Pet. App. 5a-6a (citing *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328 (9th Cir. 1987); *Gerena v. Puerto Rico Legal Serv., Inc.*, 697 F.2d 447 (1st Cir. 1983); *Dobyns v. E-Systems, Inc.*, 667 F.2d 1219 (5th Cir. 1982); *Yiamouyiannis v. Chemical Abstracts Serv.*, 521 F.2d 1392 (6th Cir. 1975) (per curiam)). The Second Circuit noted that *Meyer* did not address these cases or suggest that it was overruling them. *Id.* at 12a. Since *Meyer* was decided in 1994, only three courts of appeals have addressed the question presented here. The Sixth Circuit, in reasoning largely adopted by the Second Circuit below, held that *Bivens* does encompass claims against private corporations. *Hammons v. Norfolk Southern Corp.*, 156 F.3d 701 (6th Cir. 1998). Using broad language, the D.C. Circuit has held that *Meyer* shielded from *Bivens* liability a school with very close ties to the U.S. and British governments, an entity that was in the Second Circuit's view "arguably a federal government agency." *Kauffman v. Anglo-American School of Sofia*, 28 F.3d 1223 (D.C. Cir. 1994); Pet. App. 11a n.3.

The court below explained that *Meyer* is not dispositive in this case because "private entities acting on behalf of the federal government are not the equivalent of federal agencies." *Id.* at 10a. Nor did the court find the reasons underpinning *Meyer* compelling with respect to private corporations. As the court of appeals noted, *Meyer* did not address *Bivens*' central goal of providing a remedy for constitutional violations, and that goal can be achieved here only by allowing a *Bivens* claim against CSC. *Id.* at 10a-11a. Allowing the claim to go forward, the Second Circuit found, would also serve *Bivens*' deterrence purpose because "an employer facing exposure to such liability would be motivated to prevent unlawful acts by its employees."

Id. at 11a. *Meyer*'s concern with the direct impact that federal agency liability would have on fiscal policy is inapposite here, observed the court, where any fiscal impact on the government would be indirect at best. *Id.* Finally, the court saw no reason not to incorporate the law governing claims under 42 U.S.C. § 1983, which does impose liability on private corporations acting under color of state law. *Id.* at 12a.

SUMMARY OF ARGUMENT

Thirty years ago, this Court recognized in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), that the Constitution itself limits the exercise of federal power and that damages are an appropriate remedy for those who have suffered constitutional violations under color of federal law. *Bivens* therefore recognized a cause of action for damages against those who violate constitutional rights under the color of federal authority. This principle is limited only by the doctrine of sovereign immunity, which bars suits against the United States and its agencies. As a private, for-profit corporation, CSC is decidedly *not* the federal government, so sovereign immunity does not shield it. Allowing CSC to enjoy the benefits of sovereign immunity would gratuitously insulate its shareholders against the cost of a judgment in Mr. Malesko's favor, and would disserve the twin purposes of *Bivens* — compensation and deterrence.

There is no question here that CSC was responsible for Mr. Malesko's injuries. Either CSC's policies deprived Mr. Malesko of needed medication, assigned him to a fifth-floor room, and compelled him to take the stairs, or its failure to train and supervise its employees led them to disregard his life-threatening medical condition. In either case, the injuries Mr. Malesko suffered are plainly CSC's responsibility. Recognizing Mr. Malesko's claim against CSC fulfills *Bivens*' purposes of

affording compensation to the victim of unlawfully exercised federal power, and deterring the unconstitutional abuse of federal authority.

As a private corporation contracting with the federal government, CSC performs much the same function as an intermediate to high-level federal employee. It sets policies for its employees who wield federal power and controls their hiring, training, and supervision. Its unconstitutional exercise of federal power is best deterred through the imposition of money damages. Because private corporations, unlike the federal government, are not accountable through the political process, penalizing CSC financially is the only effective way to control, not only its corporate behavior, but also the behavior of its employees. Moreover, private corporations, unlike government agencies subject to civil service laws, have great flexibility to impose financial incentives and deterrents on their employees. The federal government acknowledges the company's responsibility and control over its employees by requiring CSC to assume responsibility for litigation against its employees. Furthermore, the *Bivens* remedy itself is needed to deter the unconstitutional exercise of federal power. State law remedies, which are oriented toward different problems and do not address all unconstitutional misconduct, are inadequate.

Recognizing a *Bivens* claim directly against CSC imposes no greater risk of uncontrolled financial exposure on the government than does the routine availability of suits against federal officials under *Bivens*. The government is protected financially by its contract with CSC, which requires CSC to insure itself and its employees against damages awards, and by its freedom to choose less expensive contractors. The government already indemnifies its own employees for their *Bivens* liability. The financial effect on the government of *Bivens* awards against a contractor is much less direct than is

the effect of *Bivens* awards against government employees. Finally, *Bivens*' *purpose* is to discourage constitutional violations by those cloaked with federal power. Holding CSC liable when it uses federal power to violate the Constitution fulfills this purpose by giving CSC a powerful financial incentive to obey the Constitution's dictates. CSC's success in following the law will in turn limit the insurance costs it may seek to pass on to the government.

Bivens' narrow exceptions, which make the remedy unavailable when Congress has created an equally effective substitute or there are special factors counseling hesitation, do not apply here. The characteristics that CSC calls "special factors" — its corporate status, the possibility that its insurance rates will rise, and the fact that Congress allows some agencies to use contractors — do not counsel any hesitation in allowing Mr. Malesko's claim to proceed.

CSC's hand-wringing over the possibility that its insurance rates might go up obscures its central contention: that private corporations, which have no claim to sovereign immunity and which are subject to section 1983 liability when they violate the constitutional rights of their state prisoners, should nonetheless be held immune from *Bivens* liability when they violate the constitutional rights of their federal prisoners. There is simply no reason to make this leap. CSC exercises federal power; it houses federal prisoners in closed institutions protected from public scrutiny; and it can easily force prisoners like Mr. Malesko into life-threatening situations. *Bivens* makes clear that CSC should be held liable when it uses federal power to violate the Constitution.

ARGUMENT

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court explicitly recognized that the federal Constitution establishes a cause of action for damages against those who violate constitutional rights under color of federal authority. The foundation for *Bivens*, however, was laid in the earliest days of this Court. Two centuries ago, in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), this Court declared that "[t]he government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." This sentiment — that remedies must follow the violation of constitutional rights — was echoed again fifty-five years ago in *Bell v. Hood*, 327 U.S. 678, 684 (1946). There, while reserving the precise question decided in *Bivens*, the Court emphasized that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."

The *Bivens* cause of action — and only this cause of action — enforces our nation's paramount rights by providing a damages remedy for those whose constitutional rights are violated at the hands of federal officers or by those who are cloaked with federal power. The only limit this Court has recognized on *Bivens*' reach is for governmental entities, namely the United States itself and its agencies, entitled to invoke absolute sovereign immunity — an immunity which is waivable only by Congress.[2] Never has this Court suggested that private

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[2] Sovereign immunity sets the outer boundary to *Bivens*' reach by forbidding suits against the government. There is no

individuals or corporations, exercising federal power while doing the government's bidding for a fee, are entitled to claim *any* sovereign immunity, much less an immunity that is absolute. *Cf. Richardson v. McKnight*, 521 U.S. 399 (1997) (holding that employees of a private prison are not entitled to qualified immunity in a section 1983 action). Therefore, CSC's claim that the Court should equate a private corporation with the United States or one of its agencies should be rejected out of hand. Immunity belongs to the government, not contractors with which it does business.

Moreover, prisoners and others in federal custody, like respondent Malesko, are uniquely vulnerable to the abuse of federal power. The *Bivens* remedy is often these individuals' last and only protection against the deliberate deprivation of their constitutional rights. Mr. Malesko is not asking this Court to establish any new cause of action. He is simply pursuing the remedy recognized in *Bivens* against an unconstitutional abuse of federal power by a defendant who has no legitimate claim to any sovereign immunity. The judgment below should be affirmed.

I. *Bivens* Encompasses Mr. Malesko's Claim Against CSC.

To best understand the flaws in petitioner's argument, it is useful to begin with a detailed examination of the cause of action recognized in *Bivens*. There, this Court answered a question that it had left open twenty-five years earlier in *Bell v.*

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other limit to the class of defendants subject to *Bivens* actions. As explained below, there are also narrow exceptions to *Bivens* when Congress has established an alternative remedy, and when special factors counsel hesitation in applying *Bivens*.

Hood and held "[t]hat damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials." *Bivens*, 403 U.S. at 395. Webster Bivens alleged that federal narcotics agents had arrested him and had searched his home without a warrant or probable cause and used unreasonable force in doing so. *Id.* at 389. This Court rejected defendants' argument that state tort law provided Bivens's sole remedy. Instead, it focused on defendants' exercise of federal power and held that citizens may invoke the Constitution's protection against the abuse of that power even in the absence of any Congressional action authorizing a remedy. *Id.* at 392.[3]

The theory of *Bivens*, which is crucial to this case, is that the Constitution itself "operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize

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[3] The government suggests that *Bivens* relied too heavily on *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), a case implying a private right of action under a federal securities statute, and that its analysis is therefore outmoded. This argument misses the mark. *Borak* involved invasions of statutory rights, and this case involves constitutional violations. The courts' obligation to uphold the Constitution is more fundamental — and more important — than any rule of statutory construction. *Marbury*, 5 U.S. at 176-78. Furthermore, whatever suggestive value *Borak* may have had for the Court in deciding *Bivens*, it has long been clear that the *Bivens* doctrine is independent of *Borak*. This point was made explicit in *Davis v. Passman*, 442 U.S. 228, 238-44 (1979), which was decided after *Borak* had fallen out of favor, *see, e.g., Cort v. Ash*, 422 U.S. 66 (1975). *See also Bush v. Lucas*, 462 U.S. 367, 374 (1983) ("The federal courts' power to grant relief not expressly authorized by Congress is firmly established.").

the identical act if engaged in by a private citizen. It guarantees to citizens of the United States the absolute right to be free from" unconstitutional injury. *Id.* Where, as here, "federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Id. (quoting Bell v. Hood*, 327 U.S. at 684 (footnote omitted)); *accord Bemis Bros. Bag Co. v. United States*, 289 U.S. 28, 36 (1933). *Bivens* suits have been allowed to proceed to redress violations not only of the Fourth Amendment, as in *Bivens*, but also the Eighth and Fifth Amendments. *Carlson v. Green*, 446 U.S. 14, 19-20 (1980); *Davis v. Passman*, 442 U.S. 228, 248-49 (1979). The only limitation on the basic *Bivens* principle is that the federal government itself is immune from liability and hence may not be sued under *Bivens*.

Thus, the rule of *Bivens* is that a cause of action lies against a party that has exercised federal power in a manner that has deprived the plaintiff of a constitutionally guaranteed right. Contrary to petitioner's argument, the *Bivens* cause of action is not defined by the potential list of defendants who may be subject to such claims. Rather, *Bivens* focuses on the abuse of federal power and seeks to remedy and deter that abuse without regard to the identity of the defendant. Nothing in the logic underlying *Bivens* or its holding suggests that the absolute immunity enjoyed by the federal government should be extended to a non-government, private corporation that exercises federal power for profit.

To be sure, *Bivens* acknowledges the possibility that Congress might establish an alternative remedy that would displace the *Bivens* action or that some cases might present "special factors counseling hesitation" in the recognition of a cause of action. 403 U.S. at 396-97. But *Bivens* rejected the idea that any of the factors cited by the United States (and

resurrected here by both CSC and the United States) — including the potential drain on the public fisc — counseled against its holding or constituted "special factors." *Id.* This suit does not fall within either of *Bivens*' exceptions. Rather, it falls within the heartland of *Bivens* cases exemplified by the Court's recent decision in *Wilson v. Layne*, 526 U.S. 603 (1999), which recognized *Bivens* and section 1983 claims against federal and state officers who allowed newspaper reporters and photographers to accompany them into a suspect's home in violation of the Fourth Amendment.

Earlier cases also illustrate *Bivens*' scope. In *Davis*, a former Congressman's assistant brought a Fifth Amendment *Bivens* claim against him when she was fired because of her gender. The Court held that *Bivens* encompassed the claim, despite Title VII's specific exclusion of Congressional employees and despite the possible constitutional difficulties in discerning whether the Speech and Debate Clause protected the Congressman's action. 442 U.S. at 245-48. In *Carlson v. Green*, the plaintiff's son had died of an asthma attack while in federal prison, allegedly because the defendants failed to provide competent medical treatment and in fact took counterproductive measures. This Court held that *Bivens* encompassed Eighth Amendment claims and that the Federal Tort Claims Act, while available to the plaintiff as a parallel remedy, did not displace the *Bivens* action. 446 U.S. at 19-23.

This case falls at the core of *Bivens*' holding. Petitioner CSC, an entity exercising federal power, has allegedly violated the constitutional rights of a person in its custody. As in *Bivens*, state tort law cannot guarantee an adequate remedy, there are no special factors counseling hesitation, and a damages award will achieve both deterrence of the wrongdoers and compensation for the victim. The corporate status of the entity does nothing to alter the *Bivens* analysis; indeed, the fact that

this defendant cannot hide behind the shield of sovereign immunity makes this case straightforward.

A. As a Private Entity, CSC Is Not Entitled to Immunity When It Violates The Constitution Under Color of Federal Law.

CSC's position boils down to a claim that, because it is a corporation, rather than an individual, it may not be sued under *Bivens*. In making this argument, CSC does not point to any passage in *Bivens* or in any subsequent cases that suggests that the status of the defendant (individual or corporate) matters one whit. Nor could it. The only entities found outside of the ambit of *Bivens* have been the federal government itself, or entities this Court has held to *be* the federal government for purposes of immunity. Thus, unless CSC can demonstrate that it, a private, for-profit corporation that is beholden only to its shareholders and not the American people, is somehow entitled to invoke the protective mantle of sovereign immunity, its argument fails.

The law of sovereign immunity in *Bivens* suits parallels that in suits under 42 U.S.C. § 1983; if anything, section 1983 immunity law is more protective of the government. As this Court explained in *Butz v. Economou*:

> [I]n the absence of congressional direction to the contrary, there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by *Bivens* than is accorded state officials when sued for the identical violation under § 1983. The constitutional injuries made actionable by § 1983 are of no greater magnitude than those for which

> federal officials may be responsible.... Surely, *federal* officials should enjoy no greater zone of protection when they violate *federal* constitutional rules than do *state* officers.

438 U.S. at 500-01 (emphasis in original). This Court has held that private defendants are not entitled even to qualified immunity from section 1983 suits. *McKnight*, 521 U.S. 399; *Wyatt v. Cole*, 504 U.S. 158 (1992). It is well-established that both private and public corporations can be sued under section 1983, and neither may raise a qualified immunity defense. *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982); *Owen v. Independence*, 445 U.S. 622 (1980). Contractors who provide services to state prisons can also be held liable under section 1983. *West v. Atkins*, 487 U.S. 42 (1988). Absolute immunity has never been thought to bar a section 1983 claim paralleling Mr. Malesko's; indeed, insofar as respondent can determine, no corporation subject to a section 1983 action has ever sought to invoke absolute immunity, let alone succeeded in doing so.

Moreover, sovereign immunity has only been extended in situations where both history and policy demand it. *Cf. McKnight*, 521 U.S. at 404; *Malley v. Briggs*, 475 U.S. 335, 339-40 (1986) ("Our initial inquiry is whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts."). There is no historic tradition of immunity of any sort for private prisons, regardless of whether they were operating under local, state, or federal contract. In the nineteenth century, private contractors played an important role in prison management, especially in the South. *McKnight*, 521 U.S. at 405. The common law authorized mistreated prisoners to sue their prison contractors, even when those contractors were corporate in form. *Dade Coal Co. v. Haslett*, 83 Ga. 549 (1889) (suit for injuries sustained while

convict was on lease to private company); *Dalheim v. Lemon*, 45 F. 225 (1891) (contracting firm liable for convict injuries); *Edwards v. Pocahontas*, 47 F. 268 (CC Va. 1891) (suit against municipal corporation over prison conditions); *see generally McKnight*, 521 U.S. at 405-06.

There is no policy reason to extend sovereign immunity to bar Mr. Malesko's constitutional claim against CSC. A defendant seeking absolute immunity "'must bear the burden of showing that public policy requires an exemption of that scope.'" *Cleavinger v. Saxner*, 474 U.S. 193, 201 (1985) (quoting *Economou*, 438 U.S. at 506); *accord McKnight*, 521 U.S. at 404. Defendants that were far more closely linked to the federal government than CSC have sought absolute immunity, only to have this Court reject their claims in case after case. For example, in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court held that Presidential aides, like Executive Branch officials generally, are not generally entitled to absolute immunity. *Saxner*, 474 U.S. at 205, established that members of a federal prison's discipline committee were not entitled to absolute immunity despite the committee's adjudicatory function. Even the President of the United States himself is not immune to suit for his unofficial conduct. *Clinton v. Jones*, 520 U.S. 681, 694-95 (1997). *Westfall v. Erwin*, which reversed a holding that sovereign immunity barred certain state tort law claims, explains why absolute immunity is so rarely available:

> This Court always has recognized, however, that official immunity comes at a great cost. An injured party with an otherwise meritorious tort claim is denied compensation simply because he had the misfortune to be injured by a federal official. Moreover, absolute immunity contravenes the basic tenet that individuals be held accountable for their wrongful conduct.

> We therefore have held that absolute immunity for federal officials is justified only when "the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens."

484 U.S. 292, 295-96 (1988) (quoting *Doe v. McMillan*, 412 U.S. 306, 320 n.3 (1973)).

This Court in *McKnight* soundly rejected the argument that private prisons will suffer from "overly timid, insufficiently vigorous, unduly fearful, or 'non-arduous' employee job performance" if their employees are denied even *qualified* immunity from constitutional claims. 521 U.S. at 410. If individual employee liability does not pose a threat to private prison performance, it is hard to see why corporate liability would do so, and certainly CSC has made no such showing. Indeed, the "marketplace pressures" that prevent excess timidity in private prison guards operate even more directly on the private corporation that stands to make a profit or suffer a loss. The different rewards and constraints of the marketplace — including the possibility of losing the prison contract, greater freedom in managing employees, and mandatory insurance coverage — enable private corporate prison operators to function even when exposed to liability for their constitutional torts. *Id.* at 409-411. Government employees "act within a *different* system." *Id.* at 410 (emphasis in original). Unlike employees of a private firm, government employees are responsible through elected officials to voters. Multidepartment civil service rules often limit government supervisors' abilities to reward or punish their employees. *Id.* Private corporations like CSC are not similarly constrained. The policy reasons underlying the qualified immunity defense for public employees cannot justify denying Mr. Malesko the remedy to which the Constitution entitles him. *Cf. id.* at 412.

In light of these factors, CSC does not overtly make a claim to sovereign immunity. Rather, it makes immunity-like arguments to contend that it would be wrong for the Court to "extend" *Bivens*' coverage to corporations doing the government's business. This contention is without merit. Sovereign immunity doctrine is grounded principally in the desire to protect the public fisc, although this Court has also cited the government's interest in performing its functions smoothly and in not creating unwarranted timidity on the part of government officers. *McKnight*, 521 U.S. at 407-08; *Erwin*, 484 U.S. at 296-97 (citing *Barr v. Matteo*, 360 U.S. 564, 571 (1959)); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949). In this case, where the party seeking the shield of immunity is a corporation, not the government, none of these concerns is legitimate.

CSC's *Bivens* liability to Mr. Malesko likely poses *less* threat to the federal fisc than does the parallel *Bivens* action against a federal officer in CSC's position; surely it does not pose more risk. To begin with, CSC insures itself against a variety of business risks, including the risk of liability for torts, constitutional and otherwise. CSC Annual Report, SEC Form 10K at 12 (filed Apr. 2, 2001) (available at www.freeedgar.com, ticker symbol CSCQ); CSC Prospectus at 24 (Sept. 12, 1996), Joint Appendix in the United States Court of Appeals for the Second Circuit, at 142. Indeed, the federal government *requires* the private prisons with which it contracts to carry liability insurance. *Id.*; Bureau of Prisons, Statement of Work: Community Corrections Center 8 (Dec. 2000) [hereinafter "BOP Statement of Work"] (available at http://www.bop.gov/ccdpg/ccdccc.pdf). And it is CSC's "general practice to indemnify individual employees who are sued in connection with matters arising within the scope and course of their employment, and which are not criminal in nature." Letter from George P. Stasiuk to Steven Pasternak at

1 (Jan. 11, 1999), Joint Appendix in the United States Court of Appeals for the Second Circuit, at 153. Thus, like the private prison corporation at issue in *McKnight*, which had purchased insurance to protect itself and indemnify its employees who were subject to liability under section 1983, CSC's potential liability here is addressed fundamentally as a matter of insurance. For that reason, CSC's premiums will likely be influenced, if not directly affected, by how well it implements policies that prevent constitutional deprivations. The more damages actions resulting in compensatory damages awards, the greater the likely increase in its premiums. If those premiums climb to an unacceptable level (that is, where it is financially better for the United States not to contract with CSC), CSC will either lose its contracts to competitors that do a better job of avoiding constitutional tort actions and thus keeping their costs low, or the United States will conclude that the inability of private prisons to deter constitutional violations requires it to resume prison management responsibility itself. On the other hand, the better the job CSC does in deterring constitutional abuses, the more its premiums are likely to fall, which will save it money, enhance its ability to bid competitively on government contracts, and in the long run, possibly benefit the United States through a lower contract price. This is precisely the deterrent effect that *Bivens* meant to achieve. The incentives on CSC to eliminate constitutional abuses therefore counsel in favor of, not against, holding it subject to liability in this case.[4]

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[4] Moreover, if one takes at face value CSC's claim that a Bivens action is not needed here because Mr. Malesko has adequate state law remedies, then one wonders how CSC can possibly contend that finding liability here would have serious fiscal consequences. If we assume for the sake of argument that Mr. Malesko's claim might be worth $1,000,000 in a state law tort action, why should it matter that the claim might also be

Whatever impact constitutional tort liability may have on CSC, it is hard to see how CSC's liability here could have any effect on the public treasury. The United States has fully insulated itself against liability in its contract with CSC. Moreover, the federal government already bears the responsibility for paying both litigation costs and most damages awarded against its employees in *Bivens* actions arising out of conduct within the scope of their employment. 28 C.F.R. § 50.15; Pet. Br. at 10-11 n.8. Thus, the baseline here is that the United States already underwrites most of the expense of *Bivens*. Contracting out may *reduce* the cost to the United States from *Bivens*, but it can hardly increase it. Making it clear that contractors, as well as their employees, may be held liable under *Bivens* does not alter that fact. Through contracting, of course, the United States can control its potential *Bivens* costs by either requiring those costs to be absorbed by its contractors (which it already does), or, if it is dissatisfied with the contract prices because they are equal to or exceed the costs to the United States of operating prisons, by resuming direct responsibility for prison management.

Furthermore, unlike the federal government, CSC is subject to state tort law. If, as CSC claims, state tort law is an

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restated as a *Bivens* action, tried in federal court, with a damages award of $1,000,000? The impact on the corporation's bottom line is the same. Although, as explained later in this brief, there is no parallel state law remedy for all, perhaps even most, constitutional deprivations, CSC is plainly trying to have it both ways in arguing that a ruling in Mr. Malesko's favor would have dire fiscal consequences at that same time it argues that there is no need to permit Mr. Malesko's *Bivens* action to proceed because state law remedies are adequate.

adequate substitute for *Bivens*, then allowing *Bivens* actions against CSC will not add to CSC's costs. But to the extent a *Bivens* remedy against CSC does add to CSC's potential liability, that incremental cost — which is likely to be far less than the tort costs CSC already faces — can surely be addressed through insurance. In choosing to use prison operators that are subject to state tort liability, Congress and BOP decided that their insurance requirements adequately protect the contractors against whatever liability they may incur. Recognizing that *Bivens* applies to CSC and its employees, just as it applies to the federal employees who run other prisons, does not increase the government's burden.

B. Insulating CSC from Suit Because of Its Corporate Status Would Run Counter to *Bivens*' Purposes.

The *Bivens* remedy exists because of this Court's recognition that "[a]n agent acting — albeit unconstitutionally — in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own." 403 U.S. at 392. The *Bivens* action enforces the Constitution's "limitation upon the exercise of federal power"; the particular defendant is important only insofar as it is the conduit of federal power. *Id.* Everyday wrongs between private citizens can be, and properly are, addressed through state tort law. But an officer cloaked in federal authority is special. He can bring to bear on an individual the full weight of federal power to enforce his instructions, and the ultimate source of his power — the federal government — is in theory constrained by the Constitution, but absolutely immune from suit. The only way to deter the unconstitutional exercise of federal power, and to compensate its victim, is therefore to make the officer liable. *Id.* at 391-92.

The *Bivens* remedy was initially focused on compensation, and that remains a vital purpose of the action. *Id.* at 395-96. "The cardinal principle of damages in Anglo-American law is that of *compensation* for the injury to plaintiff caused by defendant's breach of duty." *Carey v. Piphus*, 435 U.S. 247, 254-55 (1978) (emphasis in original) (internal quotation marks and citation omitted). As Justice Harlan phrased it in his *Bivens* concurrence, "it is apparent that some form of damages is the only possible remedy for someone in Bivens' alleged position.... the sovereign still remains immune to suit.... [and] the 'exclusionary rule' is simply irrelevant. For people in Bivens' shoes, it is damages or nothing." 403 U.S. at 409-410 (Harlan, J., concurring). This Court has recognized the importance of compensation for constitutional violations in other contexts as well. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990) (holding that Due Process Clause requires compensation for taxes paid under a state law that violated the dormant Commerce Clause). Even if the *Bivens* action had no deterrent effect on private corporations, which it plainly does, the action would be needed to accomplish the complementary *Bivens* goal of providing a remedy for constitutional violations. As Justice Harlan observed in his *Bivens* concurrence:

> I agree with the Court that the appropriateness of according Bivens compensatory relief does not turn simply on the deterrent effect liability will have on federal official conduct. Damages as a traditional form of compensation for invasion of a legally protected interest may be entirely appropriate even if no substantial deterrent effects on future official lawlessness might be thought to result. Bivens, after all, has invoked judicial processes claiming entitlement to compensation for injuries resulting from

> allegedly lawless official behavior, if those injuries are properly compensable in money damages. I do not think a court of law — vested with the power to accord a remedy — should deny him his relief simply because he cannot show that future lawless conduct will thereby be deterred.

403 U.S. at 407-08 (Harlan, J., concurring) (footnote omitted).

Deterring unconstitutional conduct is the second pillar of *Bivens*. *FDIC v. Meyer*, 510 U.S. 471, 485 (1994); *Green*, 446 U.S. at 21 ("It is almost axiomatic that the threat of damages has a deterrent effect ....") It is no less important to deter CSC's unlawful conduct than it was to deter the officers' unlawful conduct in *Bivens*. To be sure, the *Bivens* defendants violated the Bivens's Fourth Amendment rights when they searched and humiliated the Bivens family and seized Webster Bivens. Those injuries were grave. But as this case exemplifies, CSC literally has the power of life and death over the inmates entrusted to its supervision. As set forth in the complaint, CSC assigned Mr. Malesko a fifth-floor room, deprived him of needed medicine for his heart condition, and then forced him to rush up so many flights of steps that he suffered a heart attack, which could well have been fatal. Jt. App. 12. As BOP policies recognize, prisoners are uniquely vulnerable to their guards. *See, e.g.*, Program Statement 5566.05, Use of Force and Application of Restraints on Inmates (available at www.bop.gov); BOP Statement of Work at 71-81 (providing detailed guidelines for prison discipline). It is especially important that those who operate prisons be reminded that the Constitution speaks directly to them. As this Court recently noted, prisons present a "continual and conceded need for deterring constitutional violations." *McKnight*, 521 U.S. at 412; *cf. DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489

U.S. 189, 199-200 (1989). It is precisely because a criminal conviction strips a prisoner of so many rights that those rights that remain must be vigilantly safeguarded.

C. CSC Is Not Entitled to Immunity by Analogy.

1. No Parallel Can Be Drawn Between CSC and a Federal Agency.

A damages remedy is a uniquely appropriate deterrent for a private corporation. As a publicly-traded corporation, CSC exists to make money for its shareholders. *See, e.g., United States v. Bynum*, 408 U.S. 125, 137-38 (1972) (corporate officer owes fiduciary duty to corporation and its shareholders); American Law Institute, *Principles of Corporate Governance* § 2.01(a) (1994) ("a corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain"). The obvious way to deter CSC is therefore to subject it to financial liability for its actions. CSC itself acknowledges that the threat of liability is a powerful incentive to improve its behavior: Its annual report states that CSC follows American Correctional Association guidelines in part to establish a "better defense against lawsuits by offenders alleging violations of civil rights." CSC Form 10K at 11. This Court recently observed that not only are firms motivated to respond to financial pressure, they are designed to do so: "The organizational structure is one subject to the ordinary competitive pressures that normally help private firms adjust their behavior in response to the incentives that tort suits provide — pressures not necessarily present in government departments." *McKnight*, 521 U.S. at 412.

In contrast, government agencies are designed to operate without making a profit. An agency's ability to spend money is

limited only by Congress' willingness to fund it. Rather than profit-making, the agency's object is to serve the public. For example, the mission statement of the Department of Justice, which includes BOP, is:

> To enforce the law and defend the interests of the United States according to the law, to provide Federal leadership in preventing and controlling crime, to seek just punishment for those guilty of unlawful behavior, to administer and enforce the Nation's immigration laws fairly and effectively, and to ensure fair and impartial administration of justice for all Americans.

http://www.usdoj.gov/02organizations/index.html.

The different goals of corporate and governmental entities manifest themselves in different constraints. A corporation is constrained by costs and revenues; an agency is constrained by politics. Each agency answers to political masters: the President and Congress. Agencies are ultimately accountable to the public, and so their activities are also subject to scrutiny under the Freedom of Information Act, 5 U.S.C. § 552, and other open government laws. It is in an agency's political interest to be viewed as performing well and within the law. Political appointees also need to be seen as honest and effective in order to further their own careers and keep their party in power. As this Court observed in *Carlson v. Green*, it is reasonable to assume that "responsible [civil service] superiors are motivated not only by concern for the public fisc but also by concern for the Government's integrity." 446 U.S. at 21.

A private corporation, of course, is not accountable to the President, Congress, or the public, especially when

compared to a federal agency. Corporations are accountable principally to their boards and shareholders. To the extent that CSC is legally accountable to the government, the accountability comes from BOP's contract-based authority to monitor CSC's performance and, if necessary, to litigate to enforce the contract. BOP may also refuse to renew the contract. Under no theory can CSC claim that it is accountable to the American people in the same manner or to the same degree as BOP, its federal counterpart.

Nonetheless, the core of CSC's argument is that, as a corporation, it is more like a government agency than it is like a government employee, and that since government agencies are immune from *Bivens* actions, it must be as well. But the equation that CSC seeks to draw between a private corporation that contracts with the government and a government agency itself is flawed at its core. In arguing that it is like a federal agency, CSC relies primarily on *FDIC v. Meyer*, 510 U.S. 471 (1994). *Meyer* recognized that no *Bivens* action lies against a federal agency. Although *Meyer* held that the FDIC's sue-and-be-sued clause waived sovereign immunity, the justifications for the FDIC's exemption from *Bivens* also form the basis for other agencies' sovereign immunity protection. None of these justifications apply to CSC.

Three reasons underlay the Court's decision. First, *Bivens* was premised on the assumption that sovereign immunity barred suits directly against federal agencies. "[W]e implied a cause of action against federal officials in *Bivens* in part *because* a direct action against the Government was not available." *Meyer*, 510 U.S. at 485 (emphasis in original). That reasoning is clearly not implicated here — *Bivens* did not rest on any assumptions about private corporations' liability. *Meyer*'s discussion of the FDIC treated it as indistinguishable from any other federal agency for *Bivens* purposes. CSC's argument that

it is "strikingly similar" to the FDIC is based more on wishful thinking than on logic. Most fundamentally, it ignores the FDIC's status as an instrumentality of the federal government. *See Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 394 (1995); *cf.* 5 U.S.C. § 552(f) (Freedom of Information Act defines "agency" to include federal government corporations). Like Amtrak, which in *Lebron* was held to be a government agency for constitutional purposes, the FDIC was created by Congress to further federal governmental goals, and a majority of its directors are appointed to the FDIC by the President with the advice and consent of the Senate. 12 U.S.C. §§ 1811(a), 1812(a)(1); United States GAO, *Government Corporations: A Profile of Existing Government Corporations* 68-69 (Dec. 1995). The other two directors are the Comptroller of the Currency and the Director of the Office of Thrift Supervision, 12 U.S.C. § 1812(a)(1), who are appointed to those positions by the President with the advice and consent of the Senate. *Id.* §§ 2, 1462a(c)(1). CSC, in contrast, was not established by the federal government, was not created to further governmental goals, is not directed by government appointees, and is not subject to federal control. It performs contracts not only for the federal government but also for state and local governments. CSC Form 10K at 7-10. Surely it is not an agency of each of these governments. *Cf. Logue v. United States*, 412 U.S. 521, 526 (1973) (county jail housing federal prisoner was not a federal agency). CSC is a private corporation that serves its private shareholders' interests.

Second, Meyer wanted to sue the agency because the officer defendant had raised a qualified immunity defense. The Court feared that allowing an end-run around immunity defenses would discourage plaintiffs from suing federal officers. *Meyer*, 510 U.S. at 485. That argument is also inapposite here because the Court has held that qualified immunity is not a defense for guards employed by private prisons. *McKnight*, 521 U.S. at

412. Furthermore, whether a plaintiff sues CSC or its employees, the corporation is responsible for both litigation costs and any damages award because it has assumed that liability by contract. As explained below, suits brought against CSC can be expected to deter constitutional violations by CSC employees. *Bivens*' deterrent function thus would be enhanced rather than undercut by allowing *Bivens* suits against corporations operating federal prisons.

Third, *Meyer* found a "'special factor[] counselling hesitation' in the creation of a damages remedy" in the "potentially enormous financial burden for the Federal Government" if direct damages actions were allowed against federal agencies. 510 U.S. at 486. This is a central concern driving federal sovereign immunity. It does not arise here where any financial effect on the federal government is indirect at best and where the government has already shielded itself from liability by requiring its prison contractors to carry liability insurance. *Meyer* is the only case in which this Court cited *Bivens*' financial impact on the federal government as a "special factor," because there, a federal agency would have been directly liable for any damages award. The idea that the government is paying the *Bivens* defendant who will eventually pay any damages judgment is hardly novel or shocking; the government indemnifies its employees against litigation arising out of conduct within the scope of their employment, including garden-variety *Bivens* litigation. 28 C.F.R. § 50.15; Pet. Br. at 10-11 n.8. CSC is required to insure itself. BOP Statement of Work at 8. Yet federal employees' exposure to *Bivens* suits has never been considered a direct drain on the federal fisc, even though the judgments ultimately are paid from the U.S. Treasury. Any damages awarded to Mr. Malesko would be paid by CSC's insurers. It can have no effect on the United States unless CSC tries to raise its prices when it seeks to renew its contracts — and even then, a competitor might outbid CSC.

Furthermore, the indirect impact that corporate liability might have on the federal government has never been held to insulate private prisons from state tort law.

2. Like a Federal Employee, CSC Is an Appropriate *Bivens* Defendant.

Like a federal employee, CSC is an entity with which a federal agency has contracted and which it has invested with federal power in exchange for CSC's performance of certain core governmental functions. *Carlson v. Green* establishes that even high-level federal employees, such as the BOP Director, can be held liable for constitutional violations that they did not directly commit but that they were responsible for preventing. CSC is in exactly this position. BOP — the relevant federal agency here — has hired CSC to perform a core government function with limited federal supervision. The heart of CSC's responsibility is to supervise its employees effectively to ensure that order is maintained without infringing the constitutional rights of inmates.

Green concerned the death, while in federal custody, of Marie Green's son Joseph Jones Jr. When Jones entered the federal prison system, he was diagnosed with chronic asthma; at one point during his incarceration, his condition required an eight-day hospital stay. After he left the hospital, prison officials failed to provide Jones with his prescribed medication. When he suffered a severe asthma attack, Jones received no competent medical care for more than eight hours. An unlicensed nurse injected him twice with Thorazine, a contra-indicated drug, and Jones died of respiratory arrest half an hour after the second injection. *Green*, 446 U.S. at 16 n.1; 581 F.2d 669, 671 (7th Cir. 1978).

As administratrix of her son's estate, Ms. Green brought his Eighth Amendment *Bivens* claim against Carlson, the BOP Director, the chief medical officer responsible for the prison medical services, and several other federal officials. 446 U.S. at 16; *see also* 581 F.2d at 671, 676. This Court held that Green was entitled to pursue the claim against the federal officials, and emphasized the deterrence aspect of the *Bivens* remedy. Of course, it was highly unlikely that the BOP Director had any role in Jones's case, let alone that he actively deprived Jones of medical care or actually administered the Thorazine. There was no allegation that the prison's chief medical officer was even present during these events. But either of them could have imposed procedures that would have prevented Jones's death, and each had the authority to prevent similar deaths in the future. From a conceptual standpoint, CSC plays the same kind of role as the defendants in *Green*. CSC decides whether to withhold prescribed medication; it decides whether prisoners' medical needs will be accommodated or ignored; and it decides how to train and equip its employees. Here, Mr. Malesko alleges that CSC denied him his medication and refused to accommodate his serious illness, as it could have done by allowing him to use the elevator or housing him on a lower floor. Both the BOP Director and CSC are amenable to suit under *Bivens* because both wield federal power and both control how federal power is used by others.

CSC argues that it is unfair for Mr. Malesko's *Bivens* cause of action to extend to CSC as well as its guards, when a prisoner incarcerated in a government-run prison may sue only the guards and not BOP. This argument ignores several points. First, it ignores the point made earlier in this brief: namely, that the reach of *Bivens* is limited only by sovereign immunity, and that BOP is immune from *Bivens* not because it is a corporation (it is not), but because as part of the United States, it is absolutely immune. Second, from a more practical standpoint,

the CSC's argument studiously overlooks the fact that the United States government by and large indemnifies its employees in *Bivens* actions. Thus, when an inmate brings a *Bivens* action against BOP employees, the United States is a real party in interest, providing attorneys to represent the defendant and providing money to pay any adverse judgment. Third, CSC ignores the fact that Mr. Malesko could presumably sue CSC's chief executive officer, just as an inmate in a government-run prison could sue the director of BOP. Since the government requires CSC to assume responsibility for — and insure against — its employees' liability, it is a sterile formality to recognize Mr. Malesko's cause of action against CSC's CEO but not against CSC itself. The arcane distinction that CSC urges on this Court is nothing more than a pleading trap intended to protect private prisons from meritorious claims. *Cf. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) (holding that the liberal system of "notice pleading" established by the Federal Rules of Civil Procedure bars the imposition of heightened pleading requirements in section 1983 cases). Fourth, CSC itself urges an anomalous result by asking this Court to insulate CSC from constitutional claims brought by inmates held under contract with BOP when CSC clearly is subject to liability in constitutional claims brought by inmates held under state contracts. Indeed, CSC holds federal and state inmates in the same facilities. CSC Form 10K at 7-10. It cuts against the grain of this Court's rulings to argue that CSC's federal prisoners are limited to state tort remedies when its state prisoners may invoke the federal Constitution. *Butz v. Economou*, 438 U.S. 478, 501 (1978).

In terms of its motivation, and therefore the incentives needed to control it, a corporation is much more like a federal employee than like an agency. Each contracts with the government to provide services at a given price. However, each

is ultimately responsible only to itself. If anything, a federal employee is more like a federal agency than is a private corporation. Unlike a federal employee, a contracting corporation can profit by cutting corners. It can save money by hiring fewer guards, offering lower wages, failing to train its employees, or withholding goods and services from inmates. Government employees are subject to a level of supervision by their superiors that the government cannot hope to match in monitoring its contractors. Brief of Amicus Curiae the Legal Aid Society in Support of Respondent at 25-27. Agencies' budgets — and therefore staffs — are generally subject to direct Congressional control; private prisons submit bids for given time periods and are thereafter free to arrange their finances as they like.

Requiring CSC to pay for the harm it commits is the best way to discourage future harm. BOP recognizes this reality by requiring each contracting prison, not individual guards, to assume responsibility for "all litigation, including the cost of litigation, brought against it, its employees or agents for alleged acts or omissions." BOP Statement of Work at 5. This requirement ends any doubt that CSC bears liability even where the nominal defendant is a CSC employee rather than the corporation itself. The requirement is grounded in four realities: (a) that CSC is in a position to control the way its employees perform their duties; (b) that CSC's policies or lack of policies may be responsible for injuries inflicted on inmates; (c) that the employees themselves may lack the assets to pay the damages awarded against them; and (d) that individual employees may be impossible to identify or find.

First, as a private corporation, CSC has free rein to control its employees. *Cf. McKnight*, 521 U.S. at 410 (noting private prison's "freedom to respond to ... market pressures through rewards and penalties that operate directly upon its

employees"). It may hire them at will, discipline them, reduce their pay, and fire them as it pleases. CSC can give superior employees promotions, raises, or extra leave. Common law courts have long recognized the significance of an employer's ability to control its employees; it is one of the underpinnings of the *respondeat superior* doctrine. *See, e.g., Riviello v. Waldron*, 47 N.Y.2d 297, 302 (1979); W. Page Keeton *et al., Prosser & Keeton on Torts* 500 (5th ed. 1984). BOP also exploits this economic reality in an effort to achieve better control over private prisons. It limits subcontracting to 25% of contract requirements "to create a uniform composition of services under the control and supervision of the facility director." BOP Statement of Work at 6-7.

As this Court has recognized, things are very different in the public sector. *McKnight*, 521 U.S. at 410 ("government employees typically act within a *different* system") (emphasis in original). Government employees ultimately report to elected officials. Federal civil service rules sharply restrict agencies' freedom either to punish or to reward their employees. *Id.* at 410-11. In contrast to private employees, individual government employees are therefore less likely to be deterred from misconduct by damages awards against their agencies. Conversely, the threat of liability is less likely to produce overly timid job performance by the employees of private corporations, both because private employment laws are more flexible and because financial considerations act as a counterbalance. *Id.*

Second, CSC's policies, rather than individual fault, may be the cause of a plaintiff's injuries. Particularly if the cause is a systemic problem such as a failure to train or a failure to address a recurring situation, there may be no one individual responsible for the deprivation. Suppose that Mr. Malesko had routinely been denied his medication. It is far from clear that, in such a case, he could point to any particular individuals within

a corporation who were responsible. It may that a single guard withheld the medication for vindictive reasons; it may be that the corporation decided to save money by providing medication to inmates only when they complained or agreed to pay for it themselves. Similarly, suppose that Mr. Malesko had routinely been denied his right to consult with counsel. Again, the denial might be the act of a single guard or it might be the result of a corporate policy to curtail inmate access to their attorneys. In these circumstances, the corporation, not any one individual, is responsible for injuries that may be caused by harmful policies or systemic failings. The *Bivens* action is meant to deter recurring, systemic constitutional violations just as much as unpredictable individual instances of constitutional violations. Only holding the corporation liable achieves this purpose. *Cf. Owen v. City of Independence*, 445 U.S. 622 (1980); *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978).

Third, an individual defendant may well be unable to pay any substantial damages judgment awarded against him. The career of a prison guard, especially in a private prison, is not particularly lucrative. It is partially for that reason, we assume, that BOP has required in its contract with CSC that CSC pay any judgments entered against its employees.

Fourth, it may be impossible for the plaintiff to identify or locate an individual defendant. As the dismissal of Mr. Malesko's claim against Jorge Urena demonstrates, Pet. App. 17a-18a, a plaintiff may be unable to identify his guards before the limitation period expires. Private prisons have no reason to disclose guards' identities to prisoners, and several reasons not to. By hiding the identities of their guards, prisons may avoid litigation against the guards, protect the guards from retaliation by disgruntled prisoners or their families, and discourage improper inmate-guard relationships. *See Sellers v. United States*, 902 F.2d 598, 602 (7th Cir. 1990) (explaining why

prisoners cannot be expected to serve BOP guards with process without assistance from the U.S. Marshals Service). However, hiding the defendants substantially impairs the value of the *Bivens* suit both as a deterrent and as a remedy. Continuing to allow suits directly against the corporation is the obvious solution. When the plaintiff cannot find an individual who is the sole defendant, there is no deterrent effect at all, let alone any compensation to the plaintiff. BOP addresses the problem by requiring the corporation to assume responsibility for litigation against its employees. It would be an empty formalism to require the plaintiff to sue an individual employee rather than the corporation that could have prevented the injury, that will conduct the defense litigation, and that will pay for the injury in the end.

Citing *Meyer*, 510 U.S. at 485, CSC argues that finding liability here will actually undercut the deterrent effect of the *Bivens* remedy by encouraging plaintiffs to sue corporations rather than their employees. This argument defies logic, stretches *Meyer* beyond its limits, and ignores cases such as *Carlson v. Green* in which plaintiffs pursued their claims against the offending officers' superiors and *Owen v. Independence*, which acknowledged the deterrent effect of entity liability in the section 1983 context. For the reasons just given, CSC's liability is likely to affect its employees' behavior as much as, if not more than, individual employee liability would. In either case, CSC's insurers will pay the damages and CSC will have an incentive to control its employees' behavior to minimize its insurance costs. *See also* Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 Yale L.J. 857 (1984); Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 Geo. L.J. 65, 76 (1999). *Meyer* was concerned that agency liability would discourage plaintiffs from suing individual officers, because officers but not federal agencies would have a

qualified immunity defense. But *Richardson v. McKnight* established that private prison guards do not have qualified immunity from section 1983 lawsuits, and CSC does not, because it cannot, argue that a qualified immunity defense would be available to private prison guards in a *Bivens* action. Therefore, *Meyer*'s concerns about diminished deterrence can apply only to federal agencies.

3. Because Private Corporations Are Liable for Their Constitutional Torts Under Section 1983, They Should Also Be Liable Under *Bivens*.

The federal courts have long looked to 42 U.S.C. § 1983 as a parallel to the *Bivens* action. Enacted in 1871, section 1983 creates a cause of action against "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." This broad language has been given detailed meaning by the federal courts, which have often recognized its similarity to *Bivens*, because both actions enforce the federal Constitution. *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 934 & n.17 (1982) (discussing purpose of section 1983); *Bivens*, 403 U.S. 388. Congress did not need to enact a federal parallel to section 1983 because federal officers could always obtain a federal forum by removing their cases to federal court. Because there was no general federal question jurisdiction in 1871, however, section 1983 was needed to ensure a federal forum for the vindication of federal rights when state officers violated those rights. *Economou*, 438 U.S. at 502 n.30.

In case after case, this Court and the lower federal courts have drawn on the parallel purposes of the two causes of

action to elaborate the scope and requirements of each. In *Wilson v. Layne*, 526 U.S. 603 (1999), for example, federal and state officers acted together; accordingly, this Court applied a single analysis to the *Bivens* and section 1983 claims. *See also, e.g., Graham v. Connor*, 490 U.S. 386, 394 n.9 (1989) (analysis of excessive force claims); *Carlson v. Green*, 446 U.S. at 21 n.6, 22 (availability of punitive damages); *Economou*, 438 U.S. at 495-96, 501 ("Surely, *federal* officials should enjoy no greater zone of protection when they violate *federal* constitutional rules than do *state* officers.") Contrary to the government's suggestion, these parallels have not been limited to questions of qualified immunity.

It is well-established, and CSC concedes, that a plaintiff may sue a private corporation in a section 1983 action. *Lugar*, 457 U.S. 922; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).[5] Just as the Court focuses on the "under color of state law" requirement in modern section 1983 cases such as *Lugar*, *Bivens* focuses on the abuse of federal authority and not the individual characteristics of the defendant. *Bivens*, 403 U.S. at 392. CSC's position is that if a state and federal prisoner confined in the same facility suffer identical injuries under the same unconstitutional policy, only the *state* prisoner will be able to sue CSC under the federal Constitution in federal court. The *federal* prisoner's only recourse against CSC – if, indeed, any is available – will be to sue CSC under state law. Nothing in section 1983 or the Constitution can justify this absurd result.

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[5] "[B]y 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 687 (1978); *accord Santa Clara County v. Southern Pac. R.R. Co.*, 118 U.S. 394 (1886) (holding that corporation is a "person" under section 1983).

"[T]he 'constitutional design' would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression." *Green*, 446 U.S. at 22. Dismissing this case based on the defendant's corporate status would vitiate *Bivens'* purposes. It would create a gulf between *Bivens* and section 1983 that cannot be justified on any policy grounds, much less the key policies underlying the two causes of action: deterrence of constitutional wrongdoing and compensation of its victims.

D. State Law Does Not Assure Enforcement of the Federal Constitution.

CSC seeks to resuscitate the argument rejected in *Bivens*: namely, that state tort law adequately protects rights guaranteed by the federal constitution against invasion by federal officers, obviating the need for a federal cause of action. Not so. The bedrock assumption underlying *Bivens* and all its progeny is that only Congress can provide an adequate alternative remedy, because only Congress can guarantee federal rights as effectively as the federal courts. State tort law is no substitute for the federal Constitution. Congress has recognized this principle by acquiescing in this Court's twenty-year-old conclusion in *Green* that the Federal Tort Claims Act does not displace *Bivens*, and by authorizing claims against federal prison guards under both *Bivens* and state law for intentional torts such as assault, battery, and false imprisonment. 28 U.S.C. §§ 2679(b), 2680(h).

State law addresses matters of state, not federal, concern, and has nothing to do with the exercise of federal power. State tort law does not have any necessary relationship to the federal Constitution, and therefore cannot deter those who violate the Constitution or compensate their victims. It is focused instead on regulating relations among individuals. "The

interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile." *Bivens*, 403 U.S. at 394 (discussing cases); *cf. Carey v. Piphus*, 435 U.S. 247, 258 (1978) ("In other cases, the interests protected by a constitutional right may not also be protected by an analogous branch of the common law of torts.... The purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action.").

Various types of wrongdoing in private prisons might give rise to a *Bivens* claim but not to a state tort claim. *See, e.g., Brown v. United States*, 653 F.2d 196 (5th Cir. Unit A 1981) (affirming dismissal of malicious prosecution claim and noting that Fourth and Fifth Amendment claims are not part of state law). The Equal Protection Clause, for example, was enacted specifically because the common law provided no remedy against government-sponsored discrimination. Thus, even if racially-motivated death threats at gunpoint by a prison guard would not constitute assault under state law, they may violate the Due Process and Equal Protection Clauses. *Burton v. Livingston*, 791 F.2d 97, 100-01 (8th Cir. 1986) (section 1983 case). Federal law or federal officials might purport to authorize unconstitutional acts, immunizing them against state tort claims. *Brown v. Nationsbank*, 188 F.3d 579, 588-89 (5th Cir. 1999) (Supremacy Clause shields private defendants acting under FBI direction from state law claims); *Burton-Bey v. United States*, (No. 96-3241) 1996 U.S. App. LEXIS 29372 (10th Cir. Nov. 12, 1996) (affirming dismissal of FTCA claim where only "*unauthorized* assumption and exercise of the right of ownership" was actionable under state law, and BOP regulations authorized the seizure at issue) (emphasis

added). Of course, such "authorization" would not shield the defendants from a *Bivens* claim if their acts were unconstitutional. Other claims arise out of unique features of the prison context, making it difficult to imagine a parallel common law claim. *Del Raine v. Williford*, 32 F.3d 1024, 1031-38 (7th Cir. 1994) (confinement in bitterly cold cell can give rise to Eighth Amendment *Bivens* claim); *Kikimura v. Turner*, 28 F.3d 592, 597-99 (7th Cir. 1994) (warden violated prisoner's First Amendment right to receive correspondence written in Japanese).

Nor can the evolution of state tort law result in a uniform interpretation of the federal Constitution. As this Court recently explained, *Bivens* and section 1983 cases provide federal courts with a valuable opportunity to clarify constitutional standards. This clarification function is so important that it justifies the courts' deciding constitutional issues before reaching the question of qualified immunity. *Wilson*, 526 U.S. at 609.

Moreover, state law does not guarantee the procedural protections needed to safeguard constitutional rights. Most importantly, the Seventh Amendment applies in *Bivens* actions, *Green*, 446 U.S. at 22-23, but does not apply to state court actions, *Walker v. Sauvinet*, 92 U.S. (2 Otto.) 90, 92-93 (1875).[6] "The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim

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[6] Of course, Congress could create an alternative remedy that does not require trial by jury, but such a remedy would have to be "an equally effective substitute" for the *Bivens* action, which includes the federal court jury guarantee. *Bush*, 462 U.S. at 378.

of the sovereign, or, it might be added, to that of the judiciary." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting). That federal right is an important element of the *Bivens* action and while states generally afford a right to trial by jury, the federal Constitution does not require them to do so.

Individual states also have their own causes of actions and procedural rules, making state tort law far from uniform. For example, negligent conduct may give rise to an assault claim in Connecticut, *Alteiri v. Colasso*, 362 A.2d 798 (Conn. 1975), or Alabama, *Honeycutt v. Louis Pizitz Dry Goods Co.*, 180 So. 91 (Ala. 1938), but not in Rhode Island, *Baran v. Silverman*, 83 A. 263 (R.I. 1912), or Mississippi, *Webb v. Jackson*, 583 So.2d 946 (Miss. 1991). *See also, e.g., Hayes v. Cambra*, (No. 99-15023) 1999 U.S. App. LEXIS 30103 (9th Cir. Nov. 15, 1999) (section 1983 retaliation claim remanded for reconsideration of sovereign immunity, but dismissal of state law claims affirmed for failure to file claim with a state agency). The enforcement of federal rights should be uniform, *see Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984); *Green*, 446 U.S. at 25, especially when those who invoke federal law are likely to file complaints *pro se* and may well be incarcerated against their will in a distant and unfamiliar state. In *Green*, for example, the state law claims were barred by Indiana's law of survivorship, but this Court held that federal law governs survivorship in the *Bivens* action. 446 U.S. at 25.

Finally and most importantly, states are free at any time to change or eliminate their own tort law, or to restrict tort remedies, yet the Supremacy Clause forbids state interference with federal rights. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819). The federal Constitution can be vindicated only in an action intended to enforce it: one under *Bivens* or section 1983. In sum, one teaching pervades *Bivens*

and its progeny: When federal power is used to violate constitutional rights, the victim must be able to seek damages for that violation in federal court.

E. *Bivens*' Two Exceptions Are Narrow, and Neither Applies Here.

This Court has decided only a handful of cases concerning *Bivens*' scope. As explained above, *Bivens*' progeny establish that Fifth and Eighth Amendment claims are cognizable under *Bivens* and that the Federal Tort Claims Act does not displace the *Bivens* cause of action. When federal authority has been used to violate constitutional rights, the victim can bring a *Bivens* action unless Congress has enacted an equally effective substitute remedy or there are special factors counseling hesitation in the absence of Congressional action. 403 U.S. at 396-97. This Court has never found a Congressional remedy to be an equally effective substitute for *Bivens*, and there is none even arguably applicable here. This Court has found "special factor[s] counseling hesitation" only in a few exceptional cases.

Two pairs of cases illustrate the stringency of *Bivens*' "special factor" standard. In *Chappell v. Wallace*, 462 U.S. 296 (1983), and *United States v. Stanley*, 483 U.S. 669 (1987), this Court expanded the doctrine of *Feres v. United States*, 340 U.S. 135 (1950), to bar *Bivens* actions by military personnel. In *Chappell*, enlisted Navy personnel sought to bring a damages action against their superior officers, but this Court held that "[t]aken together," the "unique disciplinary structure of the [m]ilitary" and Congress' control over military matters constituted "'special factors'" barring a *Bivens* action by soldiers against their superior officers. 462 U.S. at 304. *Chappell* noted that the military's needs were important enough to override the arguably plain language of the Federal Tort Claims Act in *Feres* itself. *Id.* at 299. In *Stanley*, a bare

majority of this Court held that a military exception parallel to the *Feres* doctrine barred a *Bivens* action against various federal officers arising out of LSD experimentation on unconsenting soldiers. 438 U.S. at 683-84. *Feres*, *Chappell*, and *Stanley* are simply inapplicable to this civilian case, but they do illustrate the strength of the federal interest needed to overcome the presumption that a *Bivens* action is available. "In every respect the military is, as this Court has recognized, 'a specialized society,'" not necessarily subject to civilian rules. *United States v. Johnson*, 481 U.S. 681, 690-91 (1987).

Bush v. Lucas, 462 U.S. 367 (1983), and *Schweiker v. Chilicky*, 487 U.S. 412 (1988), addressed statutory schemes that Congress created to adjudicate monetary claims against the government. *Bush* concerned civil service employees who were allegedly fired in violation of their First Amendment rights, while *Chilicky* arose out of systemic processing problems with social security benefits. The statutory remedy in each case included administrative adjudication of the aggrieved individuals' claims, judicial review, and full payment of the unlawfully withheld monies to the complainants. *Bush*, 462 U.S. at 386-88; *Chilicky*, 487 U.S. at 424-25. In both cases, Congress had addressed the specific problem at issue and, although the statutory remedies were in some respects unsatisfactory to the plaintiffs, they did constitute "special factors counseling hesitation."

It is undisputed that Mr. Malesko has no access to any statutory remedy that could displace a *Bivens* suit. The alternative remedies to which CSC alludes were not created by Congress and do not address his situation. BOP's complaint policy is the equivalent of a suggestion box: There is no provision for binding dispute resolution, let alone judicial review, and no opportunity for prisoners to obtain damages. 28 C.F.R. § 542.10 *et seq.* CSC's suggestion that Mr. Malesko

might obtain an injunction is likewise unrealistic. Even if injunctive relief would be available to a prisoner who had just suffered Mr. Malesko's injuries, now that Mr. Malesko has been released from federal custody, he lacks standing to seek an injunction in federal court. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). An injunction simply would not remedy his injuries; in Justice Harlan's words, "it is damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring).

The last "special factor" that CSC identifies is a broad pro-privatization policy on the part of Congress. Here CSC overstates its case. Most of the statutes CSC cites leave it to the agency's discretion whether to use contractors or not. *See generally* statutes cited in Pet. Br. at 28-29 n.25. But even if Congress did favor privatization, this argument utterly fails to distinguish *Bivens* or any of its progeny. Congress clearly has a pro-civil-service policy; federal agencies have required staff since their creation. The federal courts themselves have recognized the threat that liability may pose to "principled and fearless decision-making" by government employees. *Wood v. Strickland*, 420 U.S. 308, 319 (1975) (internal quotation marks and citation omitted). Yet *Bivens* was conceived as a remedy against federal officers.

Nor does the fact that Congress pursues a particular end mean that it or those exercising federal authority may ignore the Constitution on the way to that end. Indeed, the federal government's asserted move from performing core governmental functions itself to contracting out those functions makes it all the more important that contractors be at least as accountable as federal employees. Brief for the U.S. as Amicus Curiae Supporting Respondent at 21-24, *Richardson v. McKnight*, 521 U.S. 399. For decades, the federal courts of appeals have explicitly held or assumed that private corporations can be held liable under *Bivens*. *See, e.g.*, *Hammons v. Norfolk*

Southern Corp., 156 F.3d 701 (6th Cir. 1998); *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328 (9th Cir. 1987); *Gerena v. Puerto Rico Legal Serv., Inc.*, 697 F.2d 447 (1st Cir. 1983); *Dobyns v. E-Systems, Inc.*, 667 F.2d 1219 (5th Cir. 1982); *Ginn v. Mathews*, 533 F.2d 477 (9th Cir.1976); *Yiamouyiannis v. Chemical Abstracts Serv.*, 521 F.2d 1392 (6th Cir. 1975) (per curiam). Yet nothing in the array of statutes CSC cites indicates any congressional intent even to address constitutional violations by private contractors, let alone to limit contractors' liability for their constitutional torts. Congress has enacted extensive laws authorizing privatization, yet for over twenty-five years has chosen not to immunize private corporations from liability for their unconstitutional abuses of federal power. This Court should not override Congress's judgment.

The cases elaborating *Bivens*' exceptions only demonstrate the substantial congressional activity or federal interest needed to displace the *Bivens* action. There is no such activity or interest here.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be affirmed, and this case remanded to determine whether petitioner violated John E. Malesko's constitutional rights.

Respectfully submitted,

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